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NO. 89-1758

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

GARY L. PENNY,

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

On Petition For Writ of Certiorari
To the Fifth Court of Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the post-arrest impoundment and inventory of Penny's car pursuant to the written policy of the Allen Police Department violated Penny's fourth amendment rights.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas affirming Penny's conviction is attached to the Petition for Writ of Certiorari as Appendix C.

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "Penny."

JURISDICTION

The Texas Court of Criminal Appeals intially granted Penny's petition for discretionary review, but dismissed it as improvidently granted on December 14, 1988. On February 14, 1990, that court denied Penny's motion for rehearing. Penny timely filed the petition for writ of certiorari on May 11, 1990. He properly seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Penny bases his claim upon the fourth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

On December 2, 1982, at 1:28 p.m., Officer Tim Overby of the Allen Police Department stopped Penny for speeding (SF 101-02). A routine warrant check revealed that there was an outstanding arrest warrant for Penny for the felony offense of aggravated assault (SF 103). Penny was arrested, and his car was impounded pursuant to the written policy of the Allen Police Department (SF 105-06, 111). This same policy required Overby, after impounding the car, to conduct an inventory of its contents. While conducting this inventory, Overby found a loaded .357 handgun lying in the truck of Penny's car (SF 105-07).

Penny was subsequently charged and tried for attempted murder in the 292nd Judicial District Court of Dallas County, Texas, Cause No. F-83-97148. The gun found in his trunk was evidence of that crime. At trial, Penny moved to suppress the evidence seized during the inventory. The motion was denied, and he was ultimately convicted.

On direct appeal, Penny's conviction was affirmed by the Court of Appeals for the Fifth Supreme Judicial

District of Texas on July 2, 1985. *Penny v. State,* No. 05-83-378-CR (Tex. App.—Dallas 1985). Penny's petition for discretionary review was granted by the Texas Court of Criminal Appeals, but was subsequently dismissed as improvidently granted on December 14, 1988. *Penny v. State* No. 974-85, (Tex. Crim. App. 1988). Penny's motion for rehearing was dismissed on February 14, 1990.

SUMMARY OF ARGUMENT

Penny advances no special or important reason for the Court to invoke its certiorari jurisdiction in this case. He challenges the inventory search of his vehicle as being in violation of his fouth amendment rights. To the contrary, the court below properly applied the relevant constitutional standard to the facts of Penny's case. His car was impounded and inventoried pursuant to the written policy of the Allen Police Department. Both the dicatates of this policy and the conduct of the officer in question served to promote the valid purposes served by an inventory search, and at the same time served to insure that the inventory was not simply a ruse to search for evidence of a crime. Therefore, the inventory was proper, Penny's fourth amendment rights were not violated and the court below was correct in holding that Penny was not entitled to relief on his claim.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

Penny has advanced no special or important reason in this case, and none exists. This case presents only the question whether well-settled constitutional principles were applied correctly to the facts of this case. Thus, no important question of law is presented.

II.

THE COURT OF APPEALS PROPERLY APPLIED THE CORRECT CONSTITUTIONAL STANDARD TO ASSESS WHETHER THE SEARCH OF PENNY'S CAR WAS JUSTIFIABLE AS AN INVENTORY SEARCH.

Penny argues that this Court should determine that his case is worthy of review because the Allen Police Department's policy on conducting inventory searches is constitutionally inadequate. To the contrary, as found by the Texas Court of Appeals, an application of well-established constitutional principles to the facts of Penny's case makes it clear that the inventory policy of the Allen Police Department is sufficient to pass constitutional muster. Because the Court of Appeals properly applied the relevant law to the facts developed in the trial court, Penny's case does not merit review.

The seminal case in the area of inventory searches of automobiles is *South Dakota v. Opperman,* 428 U.S. 364 (1976). Therein, the Court upheld the constitutionality of a standard inventory search. In doing so, the Court noted that automobiles are frequently taken into police custody, and that the authority of police to seize vehicles and remove them from the streets is beyond challenge. *Id.* at 369. The Court continued by observing:

> When vehicles are impounded, local police departments generally follow a routine prac-

> tice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody...; the protection of the police against claims or disputes over lost or stolen property...; and the protection of the police from potential danger.

Id. The Court further noted that when police take custody of an automobile it is reasonable to search it in order to itemize the property to be held by the police. *Id.* at 371, *citing United States v. Gravitt*, 484 F.2d 375, 378 (5th Cir. 1973) (upholding as valid an inventory search which resulted in finding contraband in trunk of seized vehicle).

At issue in *Opperman* was whether it is allowable to search the glove compartment during an inventory search of an automobile. The Court held that it is because a glove compartment is a customary place for the temporary storage of valuables. In upholding the validity of the search, the Court stressed that the inventory was conducted according to an established policy. Subsequent cases have deemed this a necessary aspect to a valid inventory search. In *Florida v. Wells,* the Court reasoned that standardized criteria or established routine is necessary because

> an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.

Florida v. Wells, __U.S.__, __, 110 S.Ct. 1632, 1635 (1990).

Thus, the reason a policy is required is to prevent officers from using inventory searches as a excuse to conduct a criminal investigation. In the present case, the impoundment and inventory policies of the Allen Police Department are sufficient to prevent an inventory of the car solely for the purpose of obtaining evidence of a crime. For instance, the policy specifically informs officers that "the administration desires that vehicles be impounded only when necessary" (Petitioner's Appendix E). The policy continues to make clear that there are only a few situations that justify the impoundment of a vehicle. For instance, a vehicle may be impounded, as in the present case, when "the driver is arrested and the vehicle cannot be released to an acceptable licensed person." *Id.* Then, it is permissible to impound the vehicle when it is "necessary to reduce the possibility of personal injury, property damage or theft." *Id.*

In the present case, the officer testified that he was following the above policy in impounding the vehicle (SF 105). He testified that he impounded the vehicle because, when Penny was arrested, there was no licensed driver to whom the car could be released (SF 109). Moreover, he testified that the car was impounded to protect against damage to or theft of personal property and to protect against claims against the officer or the department (SF 111). On the facts of this case, both the dictates of the policy and the conduct of the officer insured that this search was not conducted in order to obtain evidence of a crime.

Penny argues that, even if the decision to inventory his car was proper, the scope of the inventory was not sufficiently regulated. It is true that the policy introduced into evidence in this case does not specify the scope of the inventory. However, the scope of the inventory in the present case was clearly reasonable. In *South Dakota v. Opperman*, the Court upheld the search of a glove compartment,

noting that courts in general recognize that standard inventories include the glove compartment, because "it is a customary place for documents of ownership and registration,...as well as a place for the temporary storage of valuables." *Id.* 428 U.S. at 372.

Under the reasoning of *Opperman,* then, the permissible scope of a standard inventory must also include the trunk, as that is also a common place for the storage of valuables. As stated by the Fifth Circuit in discussing the permissible scope of a standard inventory search:

> Our reading of *Opperman*, however, has led us to conclude that an inventory search may not be unlimited in scope. Once again, we are guided by the standard of reasonableness. Only so long as the scope of the search is reasonable, taking into consideration the three interests to be protected by the inventory, will it be held to be a constitutionally permissible intrusion. The complete dismantling of an automobile, or parts thereof, for example, would not withstand constitutional scrutiny because such action would not reasonably serve to promote or further the interests which justify an inventory search...
>
> * * *
>
> The starting point of our analysis is that the police, in conducting an inventory search, may ordinarily inspect the glove compartment, the trunk, on top of the seats as well as under the front seats, and the floor of the automobile. An inspection of these areas is reasonable because these are common locations in or on which it is reasonably to be expected that the owner or occupant of an automobile may place items of personalty. The

> intrusion, although serous, is justified by the need to protect the property of the owner, and to protect the police from claims.

United States v. Edwards, 577 F.2d 883, 895 (5th Cir.), *cert. denied*, 439 U.S. 968 (1978).

Not only is the holding in *Edwards* consistent with the reasoning of *Opperman*, it is also consistent with general notions of fourth amendment jurisprudence outside the context of inventory searches. Regardless of the basis for allowing a search, whether it be an inventory search or a search pursuant to a warrant, the acceptable scope of the search is the same: it is limited to those places where it might be reasonable to believe the items sought will be found. For instance, in *United States v. Ross*, 456 U.S. 798 (1982), this Court deemed a warrantless search permissible because it was based on probable cause. Regarding the scope of that search, the Court observed that "[A] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found...." Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, and drawers. *Id.* In the context of an auto search, there is no distinction between a glove compartment and a trunk; if the items sought might be found therin, it is permissible to search the area. *See Cady v. Dombrowski*, 413 U.S. 433, 447-448 (1973) (upholding caretaking inventory of trunk based on need to protect public safety where officer had reason to believe weapon would be found therein).

Penny's reliance on *Colorado v. Bertine*, 479 U.S. 367 (1987), and *Florida v. Wells*, __U.S.__, 110 S.Ct. 1632 (1990), is misplaced. Both of those cases dealt with the question when an inventory search of an automobile may include a search of those containers found within the vehicle. In both cases, the Court held that such containers could be opened lawfully only if done pursuant to an inven-

tory policy that requires opening of containers. *Colorado v. Bertine,* 479 U.S. at 376; *Florida v. Wells*, __U.S. at __, 110 S.Ct. at 1635. Penny is correct in observing that the record does not reflect that Allen has a policy regarding whether to inventory the contents of containers. However, on the facts of this case, that is not an issue. In the present case, Penny's gun was found lying in the trunk of the car; it was not hidden in any sort of container. Thus, the requirement of a policy governing the opening of containers is unnecessary.

The policy of the Allen Police Department is adequate to insure that inventory searches are not conducted simply in order to uncover evidence of crime. Moreover, there has been no suggestion in this case that any such malfeasance occurred. Rather, the policy effectively serves the important interests recognized by this Court since *Opperman*: it protects the owner's property, it protects the police from potential danger and it protects the police from lawsuits over lost or stolen property. For these reasons, the court below was correct in determining that the inventory search of Penny's car did not violate his fourth amendment rights.

That court applied the correct constitutional standard, and Penny's claim involves only the application of this standard to his particular fact situation. This Court sits to decide important, novel or recurring questions implicating constitutional guarantees, not to review factual or evidentiary determinations based upon settled principles of law. Therefore, Penny's claim does not justify this Court's exercise of its certiorari jurisdiction. *E.g. Tacon v. Arizona,* 410 U.S. 351, 352 (1983).

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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